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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 JENNIFER STEPHENS,

Civil No. 06-1480-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15
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26 AIKEN, Judge:

27 Claimant, Jennifer Stephens, brings this action pursuant to
28 the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying her application for disability insurance
3 benefits under Title II of the Act and for Supplemental Security
4 Income (SSI) disability benefits under Title XVI of the Act. For
5 the reasons set forth below, the Commissioner's decision is
6 reversed and remanded for payment of benefits.

7 **PROCEDURAL BACKGROUND**

8 Plaintiff protectively filed her applications for Title II
9 disability insurance benefits and for SSI disability benefits on
10 February 18, 2003. Tr. 55-57, 243-45. Plaintiff's applications
11 were denied initially and on reconsideration. On December 18,
12 2003, plaintiff appeared with counsel for a hearing before a
13 Administrative Law Judge (ALJ). Tr. 460-92. On April 26, 2004,
14 the ALJ issued a decision in which he held that plaintiff was not
15 disabled. Tr. 256-66. On February 15, 2005, based on
16 plaintiff's request for review, the Appeals Council remanded the
17 case to an ALJ for further development and a new decision. Tr.
18 277-79. A second hearing was held on October 31, 2005, where
19 plaintiff was present and represented by counsel. Tr. 493-525.
20 On December 12, 2005, the ALJ issued a decision finding plaintiff
21 capable of performing work in the national economy and therefore
22 not disabled within the meaning of the Act. Tr. 22-31. The
23 Appeals Council denied plaintiff's request for review, tr. 7-11,
24 making the ALJ's decision the final agency decision. See 20
25 C.F.R. §§ 416.1481, 422.210.

26 **STATEMENT OF THE FACTS**

27 Plaintiff was born in July 1963, and was 42 years old on
28 the date of the ALJ's decision. Tr. 55, 498. Plaintiff had a

1 high school education. Tr. 30, Finding 9. Plaintiff had past
2 work experience as an administrative assistant and office
3 manager. Tr. 23, 68. Plaintiff alleged disability beginning
4 September 18, 2001, due to major depressive disorder, anxiety,
5 and other mental or emotional difficulties. Tr. 67.

6 The vocational expert (VE) testified that plaintiff could perform
7 the following jobs that exist in the national economy: janitor,
8 hand packager and small products assembler. Tr. 31, Finding 11.

9 STANDARD OF REVIEW

10 This court must affirm the Secretary's decision if it is
11 based on proper legal standards and the findings are supported by
12 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
13 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
14 mere scintilla. It means such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion."
16 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
17 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
18 The court must weigh "both the evidence that supports and
19 detracts from the Secretary's conclusions." Martinez v. Heckler,
20 807 F.2d 771, 772 (9th Cir. 1986).

21 The initial burden of proof rests upon the claimant to
22 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
23 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
24 an "inability to engage in any substantial gainful activity by
25 reason of any medically determinable physical or mental
26 impairment which can be expected . . . to last for a continuous
27 period of not less than 12 months. . . ." 42 U.S.C.

28 § 423(d) (1) (A) .

1 The Secretary has established a five-step sequential
2 process for determining whether a person is disabled. Bowen v.
3 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
4 416.920. First the Secretary determines whether a claimant is
5 engaged in "substantial gainful activity." If so, the claimant
6 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
7 §§ 404.1520(b), 416.920(b).

8 In step two the Secretary determines whether the claimant
9 has a "medically severe impairment or combination of
10 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
11 §§ 404.1520(c), 416.920(c). If not, the claimant is not
12 disabled.

13 In step three the Secretary determines whether the
14 impairment meets or equals "one of a number of listed impairments
15 that the Secretary acknowledges are so severe as to preclude
16 substantial gainful activity." Id.; see 20 C.F.R.
17 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
18 presumed disabled; if not, the Secretary proceeds to step four.
19 Yuckert, 482 U.S. at 141.

20 In step four the Secretary determines whether the claimant
21 can still perform "past relevant work." 20 C.F.R.
22 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
23 disabled. If she cannot perform past relevant work, the burden
24 shifts to the Secretary. In step five, the Secretary must
25 establish that the claimant can perform other work. Yuckert, 482
26 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
27 (f). If the Secretary meets this burden and proves that the
28 claimant is able to perform other work which exists in the

1 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
2 416.966.

3 **DISCUSSION**

4 At step one of the five step sequential evaluation process
5 outlined above, the ALJ found that plaintiff had not engaged in
6 substantial gainful activity since her alleged onset date. Tr.
7 30, Finding 2. This finding is not in dispute. At step two, the
8 ALJ found that plaintiff had the following severe impairments:
9 major depression and personality disorder. Tr. 30, Finding 3.
10 This finding is not in dispute. At step three, the ALJ found
11 that plaintiff's impairments did not meet or equal the
12 requirements of a listed impairment. Tr. 30, Finding 4. This
13 finding is disputed.

14 The ALJ determined that plaintiff had the residual
15 functional capacity (RFC) to perform work with no public
16 interaction and "limited" co-worker interaction; and that she had
17 no exertional limitations. Tr. 30, Finding 6. This finding is
18 disputed.

19 At step four, the ALJ found that plaintiff was unable to
20 perform any past relevant work. Tr. 30, Finding 7. This finding
21 is not in dispute. Finally, at step five, the ALJ found that,
22 based on plaintiff's RFC, she could perform work existing in
23 significant numbers in the national economy; specifically a
24 janitor, hand packager, and small products assembler. Tr. 29-30,
25 Finding 11. This finding is in dispute.

26 Plaintiff argues that the ALJ failed to properly credit the
27 opinions of Drs. Pitchford, Suckow and Mr. Breyer. While the
28 ALJ's RFC assessment provided for no public interaction and

1 "limited" co-worker interaction, no other restrictions were
2 accepted. Tr. 28, 30. The ALJ gave the following reason for
3 rejecting Dr. Pitchford's further limitations:

4 The assessments of Mr. Breyer and Dr. Pitchford are
5 not given controlling weight. They both rely on
6 her subjective complaints to determine disabling
7 features. However, when actually tested the
8 claimant performs well enough to perform simple
9 work.

10 Tr. 28.

11 I do not find substantial evidence supporting this basis
12 for failing to fully credit Dr. Pitchford's limitations.
13 Plaintiff was examined by Dr. Pitchford, a psychologist, on May
14 9 and 12, 2005. Tr. 348-58. Besides an in-depth interview, Dr.
15 Pitchford administered the following tests to plaintiff: MMPI-2
16 profile, Wechsler Adult Intelligence Scale - III, Wechsler Memory
17 Scale - III, Trial Making Test A, Trail Making Test B, Reitan-
18 Indiana Aphasia Screening test, 21 Item Test, and Memory
19 Malinger Test. Tr. 350-51. Dr. Pitchford's objective
20 findings were as follows: plaintiff's intellectual functioning
21 falls in the low-average range, and memory functioning appears
22 consistent with IQ levels. On the Trail Making Tests her
23 performance ranged from below the 20th percentile to the 40th
24 percentile. The Memory Malinger test is used to measure a
25 person's motivation to put forth their best effort in tests of
26 memory function. Plaintiff's results demonstrated that she was
27 using her best effort to respond to testing. Although, Dr.
28 Pitchford noted that throughout testing, plaintiff appeared
"distractible, and confusable." The 21 Item Test revealed a
"genuine memory impairment." Finally, the MMPI-2 profile was

1 "valid" and suggested a "chronic mental health problem, a mixed
2 personality disorder, or both." Dr. Pitchford concluded that the
3 "severity of the profile is consistent with [plaintiff's]
4 pathological presentation." Tr. 351. Dr. Pitchford endorsed the
5 following "moderate" impairments: the ability to make judgments
6 on simple work-related decisions; interact appropriately with the
7 public, interact appropriately with supervisors, interact
8 appropriately with co-workers, respond appropriately to work
9 pressures in a usual work setting, and respond appropriately to
10 changes in a routine work setting. Tr. 356. The tests
11 administered by Dr. Pitchford corroborate plaintiff's mental
12 health history, pathology, and limitations as noted by her other
13 providers. The ALJ erred in failing to fully credit these
14 limitations.

15 Dr. Pitchford's assessment of plaintiff's abilities is
16 supported by her treating physician as far back as 1994, where
17 Dr. Glassman found plaintiff "severely disturbed and emotionally
18 compromised" with "serious, life-threatening psychiatric
19 problems." Tr. 198. Dr. Glass summarized:

20 Regarding medical necessity, this patient is a
21 severely disturbed and emotionally compromised
22 individual, with serious, life-threatening psychiatric
23 problems, who likely will be facing repeated
24 hospitalizations, medical/physical problems and
25 medical/physical complications, and ongoing
26 severe dysfunction, without proper treatment[.]

24 Her psychiatric history has included alcohol
25 dependence; amphetamine abuse; a severe eating
26 disorder with periods of anorexia and bulimia
27 nervosa which has included laxative abuse at
28 times; significant depression with suicidal ideation
and self-destructive impulses and acts; a chronic
post-traumatic stress disorder related to severe
childhood abuse and neglect; dissociative episodes
and other complex dissociative symptoms; with a

possible Dissociative Identify Disorder; multiple somatic and psychosomatic problems and history of medical treatment that is related to her complex psychiatric problems.

Tr. 198.

Plaintiff was then able to seek and hold employment for a short time until she used all available sick leave and vacation time, and then took time off without pay due to anxiety, depression, and stress. She was eventually laid off and experienced a "mental breakdown." Tr. 67-68, 464-67, 500-01.

Plaintiff then sought treatment from Marion County Mental Health. Tr. 173-75. She was diagnosed using the DSM-IV¹ with Axis I - 296.32 - Major Depressive Disorder, Recurrent, Moderate; and Axis II - Probable - 301.83 - Borderline Personality Disorder. Tr. 175. Plaintiff's Global Assessment of Functioning scores (GAF) were consistently rated at 45 on November 26, 2002, December 23, 2002, and January 21, 2003. Tr. 171-72, 175. A GAF score of 45 indicates "serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). On February 13, 2003, plaintiff's GAF dropped to 40 indicating "some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) or major impairments in several areas, such as work or school, family relations, judgment, thinking or mood (e.g., depressed man avoids friends, neglects family, and is unable to work . . .)." Tr. 170. On

¹American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV 30 (4th ed. 1994).

1 April 3, 2003, Cathy Nichols, a mental health nurse practitioner
2 at Marion County Mental Health, dropped plaintiff's GAF score to
3 20. Tr. 386. That indicated plaintiff was in "some danger of
4 hurting self or others;" "or occasionally fails to maintain
5 minimal personal hygiene;" or "gross impairment in
6 communication[.]" Id.

7 On May 15, 2003, Dr. Rexin at Marion County Mental Health
8 saw plaintiff and concluded that she was "noticeably depressed,"
9 has very poor self esteem, "engages in some distancing and
10 erroneous beliefs, not taking responsibility for her actions; and
11 finally, "I believe she is at risk for further attempts at
12 suicide." Tr. 168. Dr. Rexin also diagnosed plaintiff with
13 major depressive disorder, recurrent, as well as with an Axis II
14 Dependent Personality Disorder. Tr. 169.

15 Tom Breyer, a mental health nurse practitioner at Marion
16 County Mental Health, began seeing plaintiff on August 4, 2003.
17 Tr. 383. On December 16, 2003, George Suckow, M.D., and Breyer
18 completed a Medical Source Statement quantifying plaintiff's
19 mental residual functional capacities in detail and on a
20 function-by-function basis. Tr. 227-29. The Source Statement
21 addressed many functions not addressed by the ALJ's functional
22 assessments and concluded that plaintiff was significantly more
23 limited than did the ALJ. Id. Notably, the Statement indicated
24 that plaintiff had no ability to maintain attention for extended
25 periods of two hour segments; and only "fair ability"² to remember

26
27 ² Fair: Substantial loss of ability to perform the named activity
28 in regular, competitive employment and, at best, could do so
only in a sheltered work setting where special considerations
and attention are provided.

1 work-like procedures, understand and remember very short and
2 simple instructions, carry out very short and simple
3 instructions, maintain regular attendance and be punctual within
4 customary tolerances, sustain ordinary routine without special
5 supervision, work in coordination with or proximity to others
6 without being (duly) distracted by them, get along with co-
7 workers or peers without unduly distracting them or exhibiting
8 behavioral extremes, and to respond appropriately to changes in
9 a routine work setting. Tr. 227-28. Further, Dr. Suckow and
10 Breyer concluded that plaintiff had between "fair" and
11 "poor/none" ability to complete a normal workday and workweek
12 without interruptions from psychologically based symptoms and
13 perform at a consistent pace without an unreasonable number and
14 length of rest periods. Tr. 228. Finally, Breyer and Dr. Suckow
15 indicated that plaintiff's work capacities were "permanent" as
16 opposed to temporary. Id.

17 On July 22, 2005, plaintiff was again seen at the Marion
18 County Mental Health Clinic. Her GAF continued at 40. There was
19 noted no change in her depression or anxiety, the mental health
20 nurse discussed "crisis plans for possible increased thoughts of
21 self harm or suicidal ideation," and plaintiff was continued on
22 all of her medications. Tr. 414. On September 16, 2005, Dr.
23 Balasubramanian, at Marion County Mental Health, diagnosed major
24 depressive disorder, recurrent; history of anorexia/bulimia;
25 history of psychotic symptoms related to post traumatic stress
26 disorder; and borderline personality traits. Her GAF score was
27 45. Tr. 413.

28 I find that the ALJ erred as a matter of law in

1 discrediting the reports and notes of various Marion County
2 Mental Health providers who examined or treated plaintiff. The
3 regulations are instructive in this regard:

4 Your level of functioning may vary considerably over time.
5 the level of your functioning at a specific time may
6 seem relatively adequate or, conversely, rather poor.
7 Proper evaluation of your impairment(s) must take
8 into account any variations in the level of your
9 functioning in arriving at a determination of
10 severity over time.

11 20 C.F.R. Pt. 404, Subpt. P, app. 1 § 12.00(D)(2).

12 Further, Marion County Mental Health providers were clearly
13 in the best position to know and evaluate plaintiff over time
14 based on her treatment history with them. Regarding the value of
15 a medical source's opinion based on recurring treating contact
16 with a plaintiff:

17 [D]epending on the particular facts in a case, and
18 after applying the factors for weighting opinion
19 evidence, an opinion from a medical source who is
20 not an 'acceptable medical source' may outweigh the
21 opinion of an 'acceptable medical source,' including
22 the medical opinion of a treating source. For example,
23 it may be appropriate to give more weight to the
24 opinion of a medical source who is not an 'acceptable
25 medical source' if he or she has seen the individual
26 more often than the treating source and has provided
27 better supporting evidence and a better explanation
28 for his or her opinion.

29 Social Security Rule 06-03p.

30 The ALJ improperly discredited the Marion County Mental
31 Health treating source Medical Source Statement. Marion County
32 Mental Health were the providers treating plaintiff. They were
33 in the best position to assess plaintiff's functional
34 limitations. Those limitations should have been accepted by the
35 ALJ.

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1 Based on these errors, I find that the ALJ's decision was
2 not based on substantial evidence. Further, I find that the ALJ
3 erred in failing to fully credited the assessments of both Dr.
4 Pitchford and Marion County Mental Health regarding plaintiff's
5 capacity for sustained functioning. Moreover, Social Security
6 Ruling 96-8p requires quantification of work related abilities on
7 a function-by-function basis. The ALJ erred in failing to
8 provide the function-by-function consideration of plaintiff's
9 capacities. Finally, the ALJ's RFC assessment is not supported
10 by substantial evidence. Additional functions identified as
11 limited in the medical record should have been included,
12 including the assessments by Dr. Pitchford and Marion County
13 Mental Health.

14 The Ninth Circuit held:

15 [T]he district court should credit evidence that was
16 rejected during the administrative process and remand
17 for an immediate award of benefits if (1) the ALJ
18 failed to provide legally sufficient reasons for
19 rejecting the evidence; (2) there are no outstanding
issues that must be resolved before a determination
of disability can be made; and (3) it is clear from
the record that the ALJ would be required to find
the claimant disabled were such evidence credited.

20 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004).

21 I find that it is clear from the administrative record that
22 plaintiff cannot sustain full time competitive work, therefore,
23 as a matter of law, the ALJ cannot meet his Step 5 burden.

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